EXCLUSIVITY IN THE NEW ERA

Kansas Department of Labor
Annual Workers' Compensation Seminar
John B. Boyd
BOYD & KENTER, P.C.
Kip A. Kubin
BOTTARO, MOREFIELD, KUBIN & YOCUM P.C.

Exclusive Remedy Doctrine

- **Kansas recognizes the exclusive remedy doctrine. This legal doctrine restricts an injured worker from pursuing a civil remedy against the employer or co-employees**

K.S.A 44-504(a)

- **(a) When the injury or death for which compensation is payable under the workers compensation act was caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages. . .**

Hollingsworth v. Fehrs Equip Co., 240 Kan. 398, 729 P.2d 1214 (1986)

- "This statute is commonly referred to as the exclusive remedy provision of the Workmen's Compensation Act, K.S.A. 44-501 *et seq*. If a worker can recover benefits for an injury from an employer under the the provisions of the Workmen's Compensation Act, its remedy is exclusive, precluding a common-law negligence action for damages against the employer.

Test

- **Whether the worker can recover workers compensation benefits from the party being sued.**

***Anderson v. Nat'l Carriers, Inc.*, 10 Kan. App. 2d 203, 695 P.2d 1293 (1985)**

Applies to Statutory Employers

- **Exclusive remedy doctrine applies to parties who would be statutory employers under K.S.A. 44-503(a)**

***Selle v. Boeing Co.*, 17 Kan. App. 2d 543, 840 P.2d 542(1992)**

Applies to Co-employees

- **Exclusive remedy doctrine immunizes co-employees from suit.**
- **Test is whether each of the employees would be entitled to benefits.**

***Wells v. Anderson*, 8 Kan. App. 2d 431, 659 P.2d 833, *rev denied* 233 Kan. 1093 (1983)**

Applies to Intentional Torts

- **Exclusive remedy doctrine bars suit against other employees even when intentional tort alleged.**

***Rajala v. Doresky*, 233 Kan. 440, 661 P.2d 1251 (1983)**

Applies to Claims for Nonpecuniary Loss

- **Exclusive remedy doctrine bars any claims for consortium losses of widow or dependents in wrongful death claim.**

***Balagna v. Shawnee County*, 233 Kan. 1068, 668 P.2d 157 (1983)**

Kansas Recognizes Exceptions to the Exclusive Remedy Doctrine

Dual Capacity Doctrine

- **Suit is not barred when the employer functions in some other capacity which gives rise to liability.**

***Kimsey v. Interpace*, 10 Kan. App. 2d 165, 694 P.2d 907 (1985)**

Former Employees

- **Suit is not barred when the employee is no longer employed if the accident or injury is separate and distinct from prior injury.**

***Graber v. Crossroads Coop. Assn.*, 7 Kan. App. 2d 726, 648 P.2d 265 (1982)**

Landowners

- **Kansas decisions are divided as to whether the exclusive remedy doctrine applies to landowners who engage independent contractors.**

Landowners

- **Exclusive remedy doctrine immunizes landowners who engage contractors who have workers compensation insurance.**

***Dillard v. Strecker*, 255 Kan. 704, 877 P.2d 371 (1994)**

Landowners

- **Exclusive remedy doctrine does not immunize a landowner if the landowner owed a separate duty to the injured party.**

***Herrell v. National Beef Packing. Co.*, 259 Kan. 663 (2011)**

Retaliatory Discharge

- **Suit is not barred when the employee seeks damages for retaliatory discharge.**

***Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Chrisman* v. *Phillips Ind.*, 242 Kan. 772, 751 P.2d 140 (1988)**

Mental/Mental Injuries

- **Suit is not barred when the employee seeks damages for infliction of emotional distress when only mental injury without corresponding physical injury is claimed.**

***Bernard v. Doskocil Cos.*, 861 F. Supp. 1006 (D. Kan. 1994)**

Impact of 2011 Amendments on Exclusive Remedy Doctrine

- **Strict Construction of Statute**
- **Changes to definition of "accident" and "injury"**

The Missouri Experience

August 28, 2012

- HB 1540
- Amends 287.120 RSMo
- Generally acknowledged as an attempted 'fix' of the co-employee liability cases which follow the *Robinson v. Hooker* decision.
- Restores the "Something More" exception to Exclusive Remedy.

287.120.1 RSMo (On/After 8/28/2012)

- "Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter…

287.120.1 RSMo (On/After 8/28/2012)

- and every employer and employees of such employer shall be released from all other liability whatsoever…

287.120.1 RSMo (On/After 8/28/2012)

- except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury."

287.120.2 RSMo **(Prior to 08/28/2012)**

- **…rights and remedies herein granted to an employee shall exclude all other rights and remedies…**, **at common law or otherwise,** on account of **such accidental injury….**"

State ex rel. Badami v. Gaertner, 630 S.W.2d 175, (Mo.App. 1982)

- Cases decided upon factually specific affirmative acts
- Determinative of whether to impose co-employee liability where those acts were outside the scope of the employer's responsibility to provide a safe workplace, the "something more" standard evolved.

Something More

- *Burns v. Smith*, 214 S.W.3d 335, (Mo. Banc 2007)
- **"an affirmative act that creates additional danger beyond that normally faced in the job-specific work environment."**

287.800 RSMo

- "…shall construe the provisions of this chapter strictly…"

8/28/2005

- *Missouri Alliance of Retired Americans v. DOLIR*, 227 SW3d 670, (Mo. 2009)
- "Workers excluded from the act by the narrower definition of "accidental injury" have a right to bring suit under the common law."

J.C.W. v. Wyciskalla

- 275 S.W.3d 249, (Mo. banc 2009)
- Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction, there is no constitutional basis for this third jurisdictional concept for statutes that would bar litigants from relief.
- Thus, The Supreme Court signaled an end to deferring action until the administrative process is completed. Rather, the courts will determine whether it has jurisdiction to proceed on a negligence claim which arose in the workplace.

McCracken v. Wal-Mart

- 298 S.W.3d 473 (Mo. banc 2009)
- Rule 55.08 Defendant must raise the Affirmative Defense in Pleadings rather than a Motion to Dismiss.
- No longer will the court defer subject matter jurisdiction to hear the lawsuit where the plaintiff has chosen to file a lawsuit.

Robinson v. Hooker

- 323 S.W.3d 418, (Mo.App.WD, 2010)
- Because the plain wording of Sect. 287.120 releases employers from liability and not co-employees, strict construction required that the injured worker retain a common law right of action against co-employees.

Cooper v. Chrysler Group, LLC

- 361 SW3d 60, (Mo.App ED 2011)
- Employee injured at work in slip and fall, files worker's compensation claim, accepts benefits, then a dispute arises over rendition of surgery.

Cooper v. Chrysler (Cont.)

- Worker then files civil claim, alleging negligence causing floor to be slippery.
- Court held that the circuit court did not have the authority to decide liability for surgery, as that was for the original jurisdiction of the LIRC.

Cooper v. Chrysler (cont.)

- While Circuit Court has authority to determine the existence of an employer-employee relationship where employee is challenging the exclusivity of the work comp law, the E.D. applied primary jurisdiction doctrine so that the plaintiff had to pursue the comp claim to see if it is subject to the LIRC jurisdiction.

22nd Circuit Judge Robt. H. Dierker

- Harold Gray v. A.W. Chesterson Co., 0822-CC09789, Div. 18, Order and Memorandum of April 8, 2010.
- The 2005 Amendments to the definition of "accident" obviates the exclusivity provisions found at 287.120.2.RSMo.

Judge Dierker (cont.)

- Plaintiff alleged occupational exposure to asbestos caused serious disease.
- Occupational Diseases caused by multiple exposures are free to proceed with their common law actions, and employers have no immunity to them.

KCP&L v. Cook

- 353 S.W.3d 14 (Mo.App. WD 2011)
- Employee brought premises liability and negligence claim against his employer, alleging that his exposure to asbestos while working for employer caused him to develop mesothelioma.
- Employer filed motion for summary judgment, asserting that employee's claims fell within exclusive-remedy provisions of the Workers' Compensation Law which the Circuit Court denied.

KCP&L v. Cook (cont.)

- WD held that exclusivity of workers compensation law for occupational diseases did not apply to common law action, and thus allowed the worker to proceed with his lawsuit, which coincidentally, is set to begin April 30.

KCP&L v. Cook (cont.)

- Plaintiff did not file a worker's compensation claim.
- Cooper, plaintiff in the ED case, not only filed but accepted compensation.
- Cooper also met with injury by accident, not disease.

Knudson v. Systems Painters

- 634 F.3d 968 (8th Cir., 2011)
- Suit against multiple defendants including worker's supervisor who was initially dismissed by trial court based upon exclusive remedy.
- 8th Circuit reversed and discussed affirmative negligent acts of negligence by supervisors

Knudson (cont.)

- 8th Circuit doesn't examine Hooker v. Robinson, but instead cites Burns v. Smith to justify remand so as to allow suit to continue against supervisor.

Patricia Hansen v. Ritter & Snyder

- Mo Court of Appeals, WD # 74115
- Opinion Filed 06/29/2012
- Co-employees *do not* owe one another a personal duty of care to provide a safe workplace.

Patricia Hansen v. Ritter & Snyder

- Petition alleged that defendants were negligent and failed to use reasonable care in breach of these duties in several particulars, each of which involved failure to recognize, address, protect from, or warn plaintiff about, deficiencies in the design, use, and maintenance of equipment.
- Trial court dismissed petition holding that the alleged negligence was a part of the employer's non-delegable duty to make the workplace safe.

Patricia Hansen v. Ritter & Snyder

- Warning: Not Final as of August 22, 2012, as post decision motions pending before Missouri Supreme Court.

But, if not a non-delegable duty…

- The co-employee loses the immunity from common law when he or she affirmatively commits negligent acts outside of the Employer's responsibility to provide a safe workplace. *Hedglin v. Stahl Specialty Co.,* 903 S.W.2d 922, (Mo.App.WD 1995)

Rules of Strict Construction

Strict construction of a statute presumes nothing that is not expressed.

The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used.

Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter.

Strict Construction (Cont.)

The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions.

Where strict construction is required, the court should not enlarge or extend the law, and only the clear, plain, obvious, or natural import of the language should be used.

- Allcorn v. TAP Enterprises, 277 S.W.3d 823 (Mo.App. SD 2009)

Prevailing Factor or Proximate Cause?

- An injury is not compensable because work was a triggering or precipitating factor. 287.020.2
- Prevailing Factor is the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Prevailing Factor or Proximate Cause?

- *Martin v. Mo. Hwy & Trans. Dept.*, 981 SW2d 577 (Mo. App. 1998) In a common law tort claim, plaintiff establishes proximate cause by proving the negligent act was one of the efficient causes of the injury without which injury would not have resulted.

Prevailing Factor or Proximate Cause?

- MAI 19.01
- Verdict directing modifier used when there are multiple causes of damage, requires plaintiff to prove that "such negligence directly caused or directly contributed to cause damage to plaintiff."

Cases to Consider

- Before and after *Hooker*, is their a difference on whether you'd file a something more case?

Cases to Consider (Cont.)

- Multiple employments cause cumulative trauma – carpal tunnel, degenerative disc disease, degenerative diseases of the joints
- Occupational diseases
- Aggravations of pre-existing conditions
- Co-employee fault arising from operation of motor vehicle—car vs. truck.

Cases to Consider (cont.)

- Unsafe workplaces—Insurer safety inspections and whether employer failed to follow suggested safety improvements.
- OSHA violations
- Who is responsible for safety? For adequate staffing? Training? Equipment?

Cases to Consider (cont.)

- Does case fall between proof of Proximate cause but not Prevailing Factor?
- Was injury outside the course and scope of employment yet arose at the workplace?
- Is co-employee's action outside the scope of his duty to carry out the employer's responsibility to provide a safe workplace?

Cases to Consider (cont.)

- Did Corporate officer or supervisor step outside of role as agent acting for employer and assume role of working with Injured Employee?
- Is there an affirmative negligent act which breaches the personal duty of care , as opposed to a failure to act.

Cases to Consider (cont.)

- Skylight hole in roof has plywood over opening, which fails when Plaintiff places his weight on the temporary cover installed by a co-worker.

(*Gunnett*)

Cases to Consider (cont.)

- Defendant raised employee 20 feet above ground on a forklift, knew defect in its hydraulic stabilizers, didn't warn employee, and while standing on a pallet to work, falls to his death.

(*Logsdon*)